In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-254

ROLAND DORL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner challenges as arbitrary and capricious the denial by the Air Force Board for Correction of Military Records of his request to void his discharge and restore his Reserve status.

Petitioner was an enlisted reservist in the United States Air Force, not on active duty, when he was tendered an appointment as a captain contingent upon his agreement to retain Ready Reserve status and his assignment to a Ready Reserve unit. Petitioner accepted the appointment and was assigned to the 26th Air Division as of May 11, 1964. He executed a Ready Reserve Agreement on June 3, 1967, to expire June 1, 1968.

Pursuant to orders issued April 12, 1968, petitioner's Ready Reserve unit was ordered to extended active duty as of May 13, 1968. Petitioner was given a sixty-day delay to July 12, 1968. On May 28, 1968, petitioner requested exemption from recall to active duty and trans-

fer to an inactive Reserve status due to: (1) the illness and death of his father, who died May 13, 1968; (2) limited usefulness to the Air Force as a deferred officer for promotion[1]; (3) the fact that he was an excess captain in his unit; (4) his previous recall during the 1962 Cuban crisis; (5) his essentiality at his place of employment; and (6) estate management problems due to the death of his father. As required by Paragraph 17 of Air Force Manual 45-2, petitioner's request for exemption was duly processed and approved. Petitioner's tender of resignation was concurrently accepted and he was honorably discharged, effective June 14, 1968.

On October 25, 1968, petitioner requested the Air Force Board for Correction of Military Records to remove certain Officer Efficiency Reports[2] from his records and to reinstate his commission in the Reserve. The Board denied petitioner's application on July 30, 1969. On July 4, 1970, petitioner requested reconsideration by the Board and on September 28, 1970, petitioner was advised that a hearing would be held on January 20, 1971. On December 15, 1970, petitioner filed suit in the Court of Claims "to recover amounts due him as a result of his unlawful dismissal" from the Reserve. Notwithstanding the pendency of the suit, the Board hearing was conducted as scheduled, with petitioner alleging that: (1) the OERs in question were false and erroneous and had caused him to be passed over for promotion; (2) his resignation was not voluntary and was

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[1] On December 4, 1967, petitioner was considered and not selected for promotion to the rank of Major.

[2] Petitioner was given six Officer Efficiency Reports (OERs) from May 11, 1964, to November 3, 1967. The first two evaluated petitioner as "very fine." The last four rated him as "effective and competent." Only the last three OERs were challenged by petitioner.

contrary to 10 U.S.C. 673 and 1163; and (3) his resignation was withdrawn by him by telegram before being acted upon.

The Board, in a 3 to 2 decision, concluded that there was doubt whether the OERs in question had been accurately, impartially, and timely filed and, as a result, declared them void and removed from petitioner's records. However, the Board determined that the evidence was insufficient to warrant setting aside petitioner's discharge and reinstating him. On March 29, 1971, the Assistant Secretary of the Air Force approved the majority decision and on May 17, 1971, petitioner amended his Court of Claims petition to allege arbitrary, capricious, and unlawful action by the Board in not granting him all the relief requested.

On cross motions for summary judgment, the Court of Claims granted judgment for the United States. The Court held that "[t]he decision of the Board was neither arbitrary nor capricious and was supported by substantial evidence" (Pet. App. A2).

The Court of Claims was correct in holding that petitioner had failed to show that the Board's decision denying petitioner's request for reinstatement was arbitrary, capricious, or unsupported by substantial evidence. See, *e.g.*, *Curtis E. Wood* v. *United States*, 176 Ct. Cl. 737; *James D. Stephens* v. *United States*, 174 Ct. Cl. 365, 358 F. 2d 951 (Ct. Cl.). Although petitioner claims that his resignation from the Reserve was the result of coercion and duress, the record shows that, rather than be recalled to active duty, petitioner voluntarily resigned his commission in order to remain in civilian life. See *Hanes* v. *Pace*, 203 F. 2d 225 (C.A.D.C.). There is nothing in 10 U.S.C. 673 or 1163 which precludes the requirement of the submission of a resignation

with a request for exemption; indeed, the regulations petitioner challenges merely implement the statutory provisions which are calculated to have the Ready Reserve actually ready when its services are needed in time of war or national emergency. Moreover, the evidence is also insufficient to sustain petitioner's contention that his resignation was withdrawn prior to acceptance, since the telegram allegedly sent for that purpose by petitioner (Pet. App. A1) fails to indicate such a withdrawal and, in any event, there is no proof that the telegram was ever received by the Air Force.[3]

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1973.

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[3] Petitioner also alleges that the District Court for the District of New Jersey erroneously dismissed for lack of jurisdiction his suit for damages against Major Jerome Rosenberg, the commanding officer who submitted the OERs later voided. However, petitioner never appealed to the court of appeals from that judgment, entered on November 16, 1972 (Pet. App. A15).